In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 700

UNITED STATES OF AMERICA, APPELLANT

v.

RAY S. FISHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

This memorandum is filed in response to this Court's request to discuss the issue of timeliness raised in appellee's motion to dismiss or affirm.

The order dismissing the indictment against appellee was entered on March 5, 1965. On March 23, the government moved for a rehearing. The motion was entertained by the district court and oral argument was heard on it. On July 6, 1965, the court issued a written opinion (R. 42–45) stating that the motion of the government was in good faith and was filed within allowable time limits[1] but declining to set

[1] Appellee argues that the government's petition for rehearing was untimely under the rules of the district court in question. As noted above, the district court treated it as

214-680—66

aside the original judgment. The opinion concluded: "Let an appropriate order be submitted" (R. 45). The order contemplated by the opinion was signed by the court on July 21, 1965 (R. 47), filed on July 23, 1965 (a Friday), and entered on the docket on July 26, 1965 (the following Monday). Thirty days after the entry on the docket, the government filed its notice of appeal.

The appeal was timely if the notice was filed "within thirty days after the decision or judgment has been rendered." 18 U.S.C. 3731. Rule 11(2) of the Rules of this Court explains that this means thirty days after "entry of the judgment or order appealed from." It is settled that where the practice is to enter a judgment after an opinion (or where it is made clear that an order will follow) it is the judgment or order, not the opinion, from which the time to appeal is computed (*United States* v. *Hark,* 320 U.S. 531; *United States* v. *Midstate Co.,* 306 U.S. 161), and that where a timely petition for rehearing (see n. 1, *supra*) is filed within the permissible time for appeal the time to appeal runs from the order denying the petition for rehearing (*United States* v. *Healy,* 376 U.S. 75, 77–80). Under these well settled principles, it is clear that the government's notice of appeal in this case was timely filed.

---

timely. Whether the court was correct or not in so treating it is irrelevant. Where, as here, "the court allows the filing [of an untimely petition for rehearing] and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena,* 311 U.S. 262, 266.

Petitioner argues that since 18 U.S.C. 3731 refers to the day the decision or judgment is "rendered", the day the order is signed is controlling. This reading, however, is refuted by Rule 11(2), which fixes "entry" of the judgment as the controlling date. The rule, in our opinion, particularizes rather than contradicts the statute; but, assuming there is a conflict, the rule must prevail. The period set by the rule is incorporated by reference in Rule 37(b) of the Federal Rules of Criminal Procedure.[2] Those rules "prescribe the times for and the manner of taking appeals" (Criminal Appeals Rules Act (1933), 47 Stat. 904, 18 U.S.C. 3772), and when the rules became effective "all laws in conflict therewith" were thereupon "of no further force" (Rules Act, *supra*)—including (to the extent there may be any conflict) 18 U.S.C. 3731.[3] Accordingly, this Court has always deemed timeliness controlled by the date of entry, rather than the date of signing, of the order appealed from.[4]

---

[2] This portion of Rule 37(b) is unchanged by the recent revisions of the criminal rules. Compare p. 4, *infra*.

[3] Section 3731 derives from 34 Stat. 1246, enacted in 1907—long before the Rules Act.

[4] See *United States* v. *Healy*, *supra*, where this Court found the date of the denial of a petition for rehearing to be November 8 (376 U.S. at 77)—the day the order was filed and entered on the docket (Record, No. 64, O.T. 1963, p. 2)—rather than November 5, the date the order was signed (*id.*, p. 12); and *United States* v. *Midstate Co.*, *supra*, where this Court found that the time for filing the notice of appeal ran from July 2 (306 U.S. at 163, n. 2)—the date the order was filed and entered on the docket (Record, No. 287, O.T. 1938, p. 1)—rather than June 23, the date the order was signed (*id.*, p. 28).

The only other question is whether the order denying the petition for rehearing was "entered," within the meaning of Rule 11(2), on the day of filing or the day of docketing.[5] The usual meaning of the term "entry" is entry in the clerk's docket—the notation by which public notice is given of the contents of the files and the status of the case. The Civil Rules, in using the term in a like context, expressly adopt this meaning (see Rule 58, F.R. Civ. P.). Thus, where a written order is issued in a civil case, the clerk's notation of the order in the docket fixes the date from which the time to appeal runs (see *United States* v. *Schaefer Brewing Company,* 356 U.S. 227). Similarly, Rule 37(a)(2) of the revised Criminal Rules explains that, for purposes of fixing the time within which the government must file a notice of appeal to a court of appeals, "30 days after entry of the judgment or order" means thirty days after its entry in the criminal docket.[6] We submit that the term "entry" in Rule 11(2) should likewise be interpreted to mean the docketing of the order. The government's notice of appeal was therefore timely.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

---

[5] In the present case, a week-end intervened between filing and docketing, and the appeal would be untimely if the day of filing controls.

[6] This gloss was added to resolve any doubt on the point, not to change existing law. Advisory Committee's Note (4).

U.S. GOVERNMENT PRINTING OFFICE:1966